

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION**

**IN RE: DIGITEK PRODUCT LIABILITY
LITIGATION**

MDL NO. 1968

THIS DOCUMENT RELATES TO ALL CASES

**DEFENDANTS' MOTION FOR ENTRY OF A *LONE PINE*
CASE MANAGEMENT ORDER**

In light of information gathered from recent responses to Requests for Admission served by various plaintiffs and medical records obtained by Defendants through a third party provider, Defendants Actavis Totowa LLC, Actavis Inc., Actavis Elizabeth LLC, UDL and the Mylan Defendants (“Defendants”) respectfully move this Court, under Federal Rule of Civil Procedure 16, for entry of a limited *Lone Pine*¹ order requiring plaintiffs to establish proof of digoxin toxicity in individual cases. The record in this litigation establishes that a substantial number of cases currently pending in the MDL are not supported by any case-specific evidence of digoxin toxicity. Therefore, Defendants specifically request that plaintiffs be required to produce an affidavit from a medical expert identifying case-specific evidence of digoxin toxicity. The Affidavit should identify the specific portions of medical records that, to a reasonable degree of medical certainty, constitute case-specific evidence of digoxin toxicity (e.g. medical records that show elevated digoxin levels or references in the records showing a clinical concern about it). This should be ordered in all pending cases except the cases selected for trial group one. Defendants request that the court grant all Plaintiffs 30 days from the entry of such an order to produce the required affidavit. In newly

¹ *Lone Pine* orders, derived from *Lore v. Lone Pine*, No. L-336006-85, 1986 WL 637507 (N.J. Super. Ct. Nov. 18, 1986), are pre-discovery orders requiring plaintiffs to provide some evidence of certain elements of their claims, e.g. medical causation, in the form of affidavits or expert reports to support a credible claim. See *Steering Committee v. Exxon Mobil Corp.*, 461 F.3d 598, 604 n.2 (5th Cir. 2006) (citing *Acuna v. Brown & Root, Inc.*, 200 F.3d 335, 340 (5th Cir. 2000)).

filed cases, Plaintiffs should be granted 30 days from the date of filing to produce such an affidavit. If no affidavit is produced, the case should be dismissed.

Lone Pine orders have been widely used to manage mass tort claims and to eliminate spurious claims. *Manual For Complex Litigation*, 4th Ed, § 11.34 AC. Though generally much broader than the order requested here, entry of a limited *Lone Pine* order in the Digitek® MDL will promote efficiency and help the court control this docket by requiring a threshold demonstration of proof that each plaintiff has some evidence to support his or her claim regarding digoxin related injury. This will eliminate cases improvidently filed in the Digitek® MDL and discourage the future filing of meritless claims. Further, entry of Defendants' Proposed Order will not impose any undue burden on plaintiffs. This is evidence essential to prove individual cases. Accordingly, Defendants respectfully request that the Court grant Defendants' Motion and implement a *Lone Pine* case management order in the Digitek® MDL.

A Brief in Support of this Motion is attached.

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CERTIFICATE OF SERVICE

I hereby certify that on September 10, 2009, a copy of the foregoing Motion for Entry of a *Lone Pine* Case Management Order was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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